GREAT EASTERN LIFE ASSURANCE (MALAYSIA) BHD v. PRAKASA RAO SAMACHULU

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: W-04(NCC)(W)-212-05-2018]
26 JULY 2019

INSURANCE: *Policy – Total and permanent disability – Whether insured party's condition fell within policy definition of 'total and permanent disability' – Whether incapacity to do or engage in any work or occupation must relate to insured party's former or actual occupation – Whether insured party incapacitated from going back to former occupation on account of injury suffered – Whether insured party suffered from total and permanent disability in accordance with policies purchased by him – Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu*

The respondent ('plaintiff') was a self-employed mechanic, running his own motor workshop. Between the years 1999 until 2008, he had subscribed to a total of 11 life insurance policies provided by the appellant ('defendant'). On 14 June 2010, he had an accident while working at his workshop and suffered an injury to his neck. The subsequent course of events culminated in his claim for total and permanent disability ('TPD') benefits arising from the said insurance policies. The defendant, however, rejected the plaintiff's claim on account that the plaintiff's alleged condition did not fall within the policy definition of 'total and permanent disability' as provided by the said insurance policies. Hence, the plaintiff's action at the Sessions Court, which was dismissed. The High Court, in allowing the plaintiff's appeal against the decision of the Sessions Court, found that the plaintiff could not work as a mechanic after the accident, and that based on the case of *Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu* ('*Kathirvelu*'), the plaintiff had indeed suffered from TPD in accordance with the provisions of the policies purchased by him. Hence, this appeal by the defendant against the decision of the High Court. The issues that arose were (i) whether the Judicial Commissioner ('JC') had erred in deciding that the plaintiff was totally and permanently disabled; (ii) whether the JC had erred in deciding that the plaintiff was totally and permanently disabled based on the decision of *Kathirvelu*; and (iii) whether the definition of 'total and permanent disability' must be interpreted in the context and construction of the terms in the policy; unlike *Kathirvelu*'s case, the disability referred to in the policies subscribed to by the plaintiff was not confined to his ability to return to his original occupation, but rather his ability to do any work at all. The plaintiff, on the other hand, submitted that (i) the medical evidence showed that the plaintiff had no possibility of making a full recovery and returning to his occupation as a mechanic; and (ii) the JC was right in relying on the decision in *Kathirvelu*'s case.

Held (dismissing appeal with costs)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The underlying consideration of the definition of TPD in the instant case was the total and permanent disability to do or engage in any work occupation or profession, almost akin to the definition in *Khathirvelu*'s case. Thus, this court found that the decision in *Khathirvelu* was very persuasive. This court would thus be associated with the said decision and unequivocally found that the clause or definition therein 'should be understood in the context of the actual business or occupation of the plaintiff.' Hence, the incapacity to do or engage in any work or occupation must relate to the plaintiff's former or actual occupation. It must therefore be related to his incapacity to work in his former occupation as a mechanic. That was the only job the plaintiff had done all his life. (para 31)

(2) The plaintiff had been incapacitated from going back to his former occupation as a mechanic on account of the injury suffered by him in the accident. Hence, this court was in agreement with the JC's finding that the plaintiff had indeed suffered from TPD in accordance with the policies purchased by him. In addition, it was of no relevance that the insurance policy referred to in *Kathirvelu*'s case was a personal accident policy. What was of relevance was the purport of the definitions of TPD in both the insurance policies (in the instant case and in *Kathirvelu*'s case) which this court had duly concretised. Thus, the decision of the JC was hereby affirmed. (paras 34 & 35)

Case(s) referred to:
Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 SC ***(refd)***

For the appellant - Andrew Teh, Tan Chong Pei & Azura Abrar; M/s Wong Lu Peen & Tunku Alina
For the respondent - Venkateswara Kandasamy; M/s M Ravendran & Assocs

[Editor's note: For the High Court judgment, please see Prakasa Rao Samachulu v. Great Eastern Life Assurance (Malaysia) Bhd [2018] 6 CLJ 649 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JCA:

The Background Of The Case

[1] The appellant is an insurance company and is the defendant in the original suit at the Sessions Court. The respondent is the insured party under a life insurance policy provided by the appellant and is the plaintiff in the original suit. Both of the parties will hereinafter be referred to respectively as the plaintiff and the defendant.

[2] The plaintiff had claimed from the defendant for what is commonly known in the insurance industry as a claim for 'total and permanent disability' ("TPD") benefits. Between the years 1999 until 2008, the plaintiff had subscribed to a total of 11 life insurance policies provided by the defendant. Under those policies, he would be entitled to claim for TPD benefits to the total amount of RM746,700, the amount of which, in the High Court and also before us, is not in dispute.

[3] The plaintiff's claim was dismissed by the learned Sessions Court Judge ("SCJ") and his appeal against the said decision to the High Court was allowed. Thus, the appeal before us by the defendant.

[4] It should be noted from the outset that the only issue in this appeal and also in courts below is this whether or not the plaintiff had suffered a 'total and permanent disability' ("TPD") as defined under the said life insurance policies, and thus entitled to the TPD benefits under those policies amounting to a total sum of RM746,000?

The Brief Facts

[5] The plaintiff claimed to be a self-employed mechanic, running his own motor workshop. Between the years 1999 until 2008, he had subscribed to a total of 11 life insurance policies provided by the defendant. On 14 April 2010, he had an accident while working at his workshop and suffered an injury to his neck. The subsequent course of events culminated in his claim for TPD benefits arising from the said insurance policies.

[6] On 26 April 2011, the defendant received the plaintiff's claim for the TPD benefits and thereafter, by a letter dated 14 June 2012, the defendant rejected the plaintiff's claim on account that the plaintiff's alleged condition does not fall within the policy definition of "total and permanent disability" as provided by the said insurance policies. Hence, the plaintiff's action at the Sessions Court.

[7] A total of 13 witnesses had testified, five of whom were doctors, ie, PW2 (Dato Dr Ramanathan @ Manickam a/l Ramiah); PW5 (Dr Raveendran a/l S Kandiah); PW6 (Dr Anbanandan a/l S Subramaniam); PW7 (Prof Vickneswaran a/l Mathaneswaran); and DW5 (Dr Harwant Singh a/l Hacharan Singh Tara). Their testimonies were summarised by the learned JC at pp. 22 to 30 of her grounds of judgment, bahagian A, jilid 1, rekod rayuan ("RR").

Decision Of The Sessions Court

[8] The decision of the learned SCJ is best encapsulated through the following excerpts of the judgment (at paras. 16-24 of the grounds of judgment, bahagian D, jilid 3A RR):

> [16] Setelah saya meneliti keterangan saksi-saksi kedua belah pihak, eksibit-eksibit yang dikemukakan, laporan-laporan perubatan ke atas Plaintif dan hujahan bertulis kedua belah pihak, saya memutuskan di

tahap imbangan kebarangkalian Plaintif telah gagal untuk membuktikan tuntutannya. Berdasarkan keterangan yang ada, saya mendapati Plaintif telah gagal membuktikan beliau mengalami hilang upaya kekal (TPD) seperti yang ditakrifkan di bawah polisi insurans tersebut.

[17] Di bawah takrifan polisi-polisi insurans tersebut, untuk berjaya di dalam tuntutannya, Plaintif perlulah membuktikan yang dia tidak boleh melakukan apa-apa kerja akibat dari kecederaan yang dialaminya atau pun dia telah mengalami kecederaan yang tidak boleh disembuhkan yang menyebabkan dia tidak boleh melakukan tiga dari aktiviti harian yang dinyatakan di bawah polisi tersebut walaupun dengan bantuan alat-alat bantuan. Dengan lain perkataan, kehilangan upaya kekal di bawah polisi ini tidak hanya merujuk kepada ketidakbolehan Plaintif kembali ke pekerjaan asalnya. Ianya merangkumi ketidakupayaan Plaintif untuk melakukan apa-apa kerja.

...

[19] Keterangan yang ada hanya menunjukkan Plaintif tidak boleh kembali bekerja sebagai mekanik akibat kecederaan yang dialaminya. Di bawah polisi insurans tersebut keadaan ini adalah tidak memadai untuk membolehkan Plaintif mendapat faedah hilang upaya kekal di bawah polisi-polisi insurans tersebut.

...

[24] Berdasarkan semua keterangan-keterangan ini, saya berpendapat Plaintif telah gagal untuk membuktikan dia mengalami kehilangan upaya kekal seperti yang ditakrifkan di bawah polisi-polisi insurans yang dikeluarkan oleh Defendan. Keterangan yang ada hanya menunjukkan Plaintif hanya tidak boleh kembali bertugas sebagai mekanik akibat dari kecederaan yang dialaminya. Oleh yang demikian, tuntutan Plaintif adalah ditolak dengan kos sebanyak RM20,000.00.

(emphasis added)

Decision Of The High Court

[9] The learned Judicial Commissioner ("JC") had reversed the decision of the Sessions Court, apparently based solely upon the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu* [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 ("*Kathirvelu*'s case"). We reproduce here *in extenso* the relevant parts of the judgment of the learned JC (at paras. 38 to 42 of the grounds of judgment, at pp. 40-42, bahagian A, jilid 1, RR) for purposes of clarity:

38. However, I am of the view that the Sessions Court judge had erred in one respect. He did not consider the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu* [1992] 1 CLJ (Rep) 251 where it was held as follows:

> As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock*'s case (*supra*) and looking at the whole policy hold that the definitions section therein, in particular that clause

A defining permanent total disablement as "absolute disablement from engaging in or giving attention to profession or occupation of any kind", should be understood in the context of the actual business or occupation of the plaintiff. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the
B Jabatan Kerja Raya and was therefore permanently and totally disable (*sic*) within the meaning of the policy.

Having considered the evidence and the submissions of Counsel on the first issue, we would agree with the learned Judge's finding that the bodily injury suffered by the plaintiff was solely and
C independently caused by the two accidents in the sense that they were the proximate cause of his permanent total disablement in this case and had prevented him from continuing this occupation as a technical assistant in the Jabatan Kerja Raya.

39. The above said decision is binding on this Court. The actual
D occupation of the Plaintiff is that of a mechanic. The Sessions Court judge found that to be the case. His Honour also found it to be the case that the evidence shows that the Plaintiff could not return to his work as a mechanic. Based on the said case of *Pacific & Orient Insurance*, the Sessions Court judge ought to be held [*sic*] that the Plaintiff had suffered a TPD.

E ...

41. Notwithstanding the medical evidence that the Plaintiff is not precluded from carrying out work which is supervisory or administrative in nature, there is also no evidence led by the Defendant as to exactly what, if any, job the Plaintiff could actually carry on. To say merely that the Plaintiff could give orders to his workers in the workshop from a
F wheelchair and is therefore not suffering from TPD is not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business. (see *Pocock v. Century Insurance Company Ltd* [1960] 2 Lloyd's Report 150).

G 42. Due to the aforesaid reasons, I am of the view that the Sessions Court Judge had erred in dismissing the claim of the Plaintiff. In the circumstances, I allow the appeal and grant judgment in favour of the Plaintiff as prayed in his claim with costs of RM 5,000.00 subject to allocator. The parties have confirmed that if liability is in favour of the Plaintiff, the quantum of his claim is not in dispute.

H (emphasis added)

The Submissions Before Us

[10] Learned counsel for the defendant had submitted before us, *inter alia*, as follows:

I (i) the learned JC had erred in fact and in law in deciding that the plaintiff is totally and permanently disabled, in spite of the medical and other evidence to the contrary; despite keeping up an appearance of being

wheelchair-bound and attached to wearing a neck brace, the plaintiff had been observed by witnesses to have been able to walk and feed for himself unaided, and there was evidence that traffic summons had been issued against him as the driver of a motorcar; the learned JC thus erred in finding that the plaintiff is wheelchair-bound;

(ii) the learned JC had erred in fact and in law in deciding that the plaintiff was totally and permanently disabled based on the decision in *Kathirvelu*'s case. It was submitted that *Kathirvelu*'s case has no binding effect upon this case, based on the following grounds:

(a) the insurance policy in *Kathirvelu*'s case is a 'personal accident policy' whereas the present case deals with multiple 'life insurance policy'; and

(b) the definition of "total and permanent disability" under the two insurance policies are different.

(iii) the definition of "total and permanent disability" must be interpreted in the context and construction of the terms in the policy; unlike the *Kathirvelu*'s case, the disability referred to in the policies subscribed to by the plaintiff is not confined to his ability to return to his original occupation, but rather his ability to do any work at all.

[11] Learned counsel for the respondent on the other hand submitted that:

(i) the medical evidence showed that the plaintiff has no possibility of making a full recovery and returning to his occupation as a mechanic; and

(ii) the learned JC was right in relying on the decision in *Kathirvelu*'s case.

Our Decision

[12] As the learned JC had departed from the finding of the learned SCJ on the issue of what constitutes TPD based upon the ruling in *Kathirvelu*'s case, which she opined is binding upon the lower courts, and consequent thereto, since the learned SCJ had found it to be the case that the evidence shows that the plaintiff could not return to his former work as a mechanic, the learned SCJ then ought to have ruled that the plaintiff had indeed suffered TPD, it is hence imperative upon us to look at the definition of TPD assigned by the insurance policies purchased by the plaintiff.

[13] The plaintiff had purchased the following life insurance policies from the defendant:

Policy No.	Commencement Date
(i) 7694051-0	25 November 1999
(ii) 81663109	26 September 2001
(iii) 8527833-4	11 July 2002

(iv)	8667266-9	23 December 2002
(v)	87687351	28 April 2003
(vi)	87687351	28 April 2003
(vii)	9120991-0	27 February 2004
(viii)	9120991-0	27 February 2004
(ix)	9456261-5	22 March 2005
(x)	100058454-6	30 June 2008
(xi)	100058454-6	30 June 2008

[14] What amounts to TPD will be subject to and dependent upon the definition of TPD in the policy contract. The sustainability of the plaintiff's case would stand or fall upon whether the plaintiff is totally and permanently disabled in accordance with the definition of TPD as provided for under the policies.

[15] The policy definition for TPD under the policies purchased by the plaintiff are almost identical. In a nutshell, it provided for a state of incapacity which:

(i) is total and permanent and such that there is neither then nor at any time thereafter any work, occupation or profession that the life assured can ever sufficiently do or follow to earn or obtain any wages, compensation or profit; or

(ii) is deemed to be caused by total and irrecoverable loss of both eyesight, loss of use of two limbs at or above the wrist or ankle or total and irrecoverable loss of sight of one eye and loss of use of one limb at or above the wrist or ankle.

[16] Meanwhile, policy no. 9456261-5 and policy no. 1000058454-6 (items (ix) and (x) of para. 13, above) provided a further alternative definition where TPD is also a state of incapacity which renders the insured disabled to such an extent as to be totally and permanently unable to perform at least three of the listed activities of daily living even with the use of mechanical equipment, special devices or other aids and adaptation used by disabled persons. The word 'permanent' means beyond the hope of recovery with current medical knowledge and technology.

[17] Accordingly, 'activities of daily living' as provided by the policies means:

(i) getting in and out of chair without physical assistance;

(ii) the ability to move from room to room without physical assistance;

(iii) the ability to voluntarily control bowel and bladder functions and to maintain personal hygiene;

(iv) dressing and undressing;

(v) bathing and washing one's self; and

(vi) eating.

[18] Unlike the instant case before us, the insurance policy referred to in *Kathirvelu*'s case was a personal accident policy.

[19] As can be digested from the citation, the personal accident policy taken by the respondent in *Kathirvelu*'s case provided, *inter alia*, for the payment to the respondent of a sum of RM200,000 on the terms and conditions contained in the policy. It stated that:

> if during the period of insurance the insured shall sustain any bodily injury caused by violent external and visible means which injury shall solely and independently of any other cause result in his death or disablement the company will pay to the insured or to his legal personnel representatives the sum or sums of money in accordance with the table of benefits set forth in the schedule.

[20] One of the issues raised in the said case during the trial was, has the plaintiff/respondent suffered bodily injury which has resulted in permanent total disablement as defined in the policy?

[21] The policy in a separate interpretation section defined permanent total disablement as "absolute disablement from engaging in or giving attention to profession or occupation of any kind".

[22] On appeal, the then Supreme Court ruled that:

> As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock*'s case (*supra*) and looking at the whole policy hold that the definition section therein, in particular that clause defining permanent total disablement as "absolute disablement from engaging in or giving attention to profession of any kind", **should be understood in the context of the actual business or occupation of the plaintiff**. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the Jabatan Kerja Raya and was therefore permanently and totally disabled within the meaning of the policy. (emphasis added)

[23] It is apparent that in the instant case, the plaintiff cannot rely on the alternative meaning of TPD in respect of irrecoverable loss of sight of both eyes or either one nor on the loss of use of both limbs or either one of them.

[24] Nor can the plaintiff rely on the further alternative meaning of TPD under policies no. 9456261-5 and 100058454-6 on account of non-production of evidence that he was totally and permanently unable to perform at least three of the listed activities of daily living even with the aid of mechanical equipment or special devices or other aids used by disabled persons.

[25] The plaintiff's only recourse is to prove his total and permanent incapacity to ever sufficiently do or engage in any work, occupation or profession to earn or obtain any wages, compensation or profit.

[26] In the event, how is the said clause, as enumerated in para. 15(i) above, to be interpreted or construed?

[27] We do not think that we are bound by the decision in *Kathirvelu*'s case, contrary to the view of the learned JC, who opined that she is bound by the decision in the said case, for the simple reason that the definition of TPD therein and in the instant case were differently worded.

[28] Nevertheless, there were common distinguishing characteristics in both the definitions. In the instant case, in a nutshell, the incapacity must be total and permanent, preventing the insured from doing or engaging sufficiently in any work, occupation or profession to earn wages or compensation or profit. Whereas in *Khathirvelu*'s case it envisages a situation where there was absolute disablement from engaging in or giving attention to a profession or occupation of any kind.

[29] In our view, in both the definitions, though worded differently, the paramount underlying consideration is the total and permanent or absolute disablement of the insured to do or engage in any work, occupation or profession. The two definitions carried the same ultimate meaning that the insured is incapacitated from doing any work, occupation or profession due to the injury or injuries sustained by the insured.

[30] Hence, the next issue is what kind of work, occupation or profession is envisaged or anticipated in the context of the surrounding circumstances? Does it revolve around the incapacity of the plaintiff to do or engage in just about any other kind of work as suggested by the learned SCJ or his incapacity to return to his former work as a mechanic (in his own workshop) as found by the learned JC, based on *Kathirvelu*'s case?

[31] Having regard to the fact that the underlying consideration of the definition of TPD in the instant case is the total and permanent disability to do or engage in any work, occupation or profession, almost akin to the definition in *Khathirvelu*'s case, we found the decision in *Khathirvelu*'s case very persuasive and would thus associate ourselves with the said decision and unequivocally find that the clause or definition therein "should be understood in the context of the actual business or occupation of the plaintiff". Hence, the incapacity to do or engage in any work or occupation must relate to the plaintiff's former or actual occupation. It must thus be related to his incapacity to work in his former occupation as a mechanic. After all as the evidence shows, that was the only job the plaintiff had ever done all his life.

[32] Hence, the corresponding issue for determination is whether the plaintiff had suffered bodily injury which has resulted in the permanent and total disability or incapacity of the plaintiff to do or engage in any work, occupation or profession in accordance with the provisions of the policies purchased by him.

[33] The learned SCJ found that the evidence shows that the plaintiff, due to the injury suffered by him, could not return to his work as a mechanic but is able do other kind of work or engage in other occupation, physically less consuming. Likewise, the learned JC found that the plaintiff was working as a mechanic prior to the accident and the evidence suggests that he could not work as a mechanic after the accident but that he could do work of a supervisory or administrative in nature, and based on *Kathirvelu*'s case, the plaintiff had indeed suffered from TPD in accordance with the provisions of the policies purchased by him.

[34] Upon perusal of the evidence adduced and having particular regard to the medical evidence, we are on all fours with the findings of both the learned SCJ and JC that the plaintiff has been incapacitated from going back to his former occupation as a mechanic on account of the injury suffered by him in the accident. Hence, pursuant to our ruling enumerated in paras. 28, 29, 30 and 31, above, we are in agreement with the learned JC's finding that the plaintiff had indeed suffered from TPD in accordance with the policies purchased by him. We would unhesitantly associate ourselves with the sentiments expressed by the learned JC as reiterated below:

> 41. Notwithstanding the medical evidence that the plaintiff is not precluded from carrying out work which is supervisory or administrative in nature, there is also no evidence led by the defendant as to exactly what, if any, job the plaintiff could actually carry on. To say merely that the plaintiff could give orders to his workers in the workshop from a wheelchair and is therefore not suffering from TPD is not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business. (see *Pocock v. Century Insurance Company Ltd* [1960] 2 Lloyd's Report 150).

[35] In addition, we opined that it is of no relevance that the insurance policy referred to in *Kathirvelu*'s case was a personal accident policy. What is of relevance is the purport of the definitions of TPD in both the insurance policies (in the instant case and in *Kathirvelu*'s case) which we have duly concretised in the preceding paragraphs.

Conclusion

[36] We dismissed the appellant's appeal for the reasons enumerated above in its entirety with cost, assessed at RM20,000 here and below. The decision of the learned JC is hereby affirmed.